In the

# SUPREME COURT OF UNITED STATES

October term, 1940

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No.———

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MISSOURI PACIFIC TRANSPORTATION COMPANY,
CHARLES D. JOHNSON,
COMMERCIAL CASUALTY INSURANCE COMPANY,
METROPOLITAN CASUALTY COMPANY, *Petitioners*

VS.

EUGENE A. PARKER, ADM., MYRTLE FLAGG, ADMX.,
ALICE CARROLL, ADMX., and ROY PALMER;
*Respondents and Appellees Below*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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The petition of the Missouri Pacific Transportation Company, Charles D. Johnson, Commercial Casualty Insurance Company, and Metropolitan Casualty Company,[1] shows to this Honorable Court;

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[1]Commercial Casualty Insurance Company of Newark, New Jersey, is a surety on supersedeas bond given on appeal by Missouri Pacific Transportation Company and Charles D. Johnson. The bond-

## STATEMENT OF THE CASE

The Supreme Court of the State of Arkansas affirmed a judgment for damages against petitioners in favor of the respondents, Parker, Flagg and Carroll, who were representatives of the estates of deceased minor children who met their death in a collision between a motor bus operated by respondent Johnson, and belonging to the Missouri Pacific Transportation Company, and an automobile in which the four deceased minors were riding, and operated by young Carroll. The accident occured on the night of December 2, 1938. Respondent Palmer was a passenger on the bus. Trials resulted in verdicts and judgments as follows: For the Carroll boy, $16,000.00 to the Mother, and $2,000.00 for the estate on account of conscious pain and suffering; for the Flagg boy, $16,000.00 to the Mother; and for the Parker boy, $16,000.00 for the Father. Palmer recovered $10,000.00, making a total of $60,000.00. All four cases were consolidated for purposes of trial and were briefed together in the Supreme Court of Arkansas.

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ing company was, of course, not a party to the suit in the trial court, but in the judgment entered pursuant to the opinion of the Supreme Court of Arkansas, recovery against the surety company was decreed in favor of all of the respondents, and is liable to the respondents the same as Missouri Pacific Transportation Company. The Metropolitan Casualty Company is surety on the bond executed by Missouri Pacific Transportation Company payable to Eugene A. Parker, Administrator of the estate of Joe A. Parker, deceased, for the sum of $6,000.00, and was filed pursuant to the order staying the sending down of the mandate. The undertaking of this bond is that the Missouri Pacific Transportation Company will prosecute its appeal with diligence and if the same be denied by the United States Supreme Court, or if it fails to perfect its appeal within the period allowed by law, they shall pay all damages and costs which Parker may sustain by reason of the stay of mandate. Similar bonds were posted for the protection of the other respondents and in the amounts set forth in the Supreme Court's judgment.

On appeal, the Supreme Court of Arkansas affirmed the judgment in all cases with the condition that respondents Parker, Flagg and Carroll enter remittiturs of $11,000.00 each, otherwise the cause would be reversed and remanded for new trial. Palmer's judgment was affirmed without condition. (For opinion and judgment of the Arkansas Court, see Appendix, p. 14).

At the very outset, petitioners complained of certain actions of the trial court in refusing to quash the jury panel, on the ground that the court construed an act of the State of Arkansas against petitioners in such a way as to deny petitioners rights vouchsafed to them under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that the affirmance by the Supreme Court of Arkansas of the action of the trial court in this regard likewise caused the latter court to be guilty of a denial to the petitioners of a procedural due process in violation of the Fourteenth Amendment.

The circumstances underlying petitioners' claim of a denial of Federal right are as follows:

> "In June 1939, the court appointed three jury commissioners to select the regular panel of petit jurors to serve at the July term of the Nevada circuit court, and a jury was selected. After the July term of court was convened and the jury so selected was empaneled, a motion was made in another case then pending to quash the panel because one of the jury commissioners had served as such within four years prior to this service. The motion was

sustained and the panel was quashed, and at the same time the court appointed three other jury commissioners to select a jury to serve at an adjourned term of court to convene on August 7, 1939. A jury of 32 was selected and summoned, but the court, on investigation, decided that the statutes do not provide for the selection of a jury by jury commissioners after the term begins, but that, in case the jury panel is quashed, it is the duty of the court to order the sheriff to select a jury from the bystanders. The panel selected by the second set of commissioners contained nine of the jurors selected by the first set, which was quashed on motion. Acting on the order of the court, the sheriff selected a jury panel of 32 jurors who were the same as those quashed on the court's own motion." (Appendix, p. 14.) (140 S. W. (2d) 997-1,000.)

Petitioners moved to quash the jury panel, by reason of the above, and the same was overruled. (Abstract of Brief, Vol. 1, 12-14.) (Action of the court on the motion and objections thereto by counsel for petitioners; see Abstract of Brief, Vol. 1, 75-79.)

At the conclusion of the trial, petitioners filed motion for new trial, again complaining that the action of the court in declining to quash the jury panel deprived them of fundamental and established rights in violation of the due process and equal protection clauses of the Fourteenth Amendment. (See Specifications 4 and 5 of the motion for new trial. Abstract of Brief, Vol. 1, 15.)

Petitioners excepted to the overruling of the motion for new trial, preserving the claimed Federal right. (Abstract of Brief, Vol. 1, 78.)

After entry of judgment pursuant to the jury's verdict, a supersedeas bond was filed by petitioners. (Abstrast of Brief, Vol. 1, 28-29.) The first matter brought to the attention of the Supreme Court of Arkansas on appeal was the grievance of petitioners resulting from the refusal of the trial court to quash the jury panel, and that such action amounted to denial of procedural due process in violation of the Federal Constitution.

Petitioners claim that the trial court so construed Section 8333 of Pope's Digest as to cause the same to invade the rights of petitioners in violation of the Fourteenth Amendment. This claimed Federal right was definitely presented to the Supreme Court of Arkansas. Error was properly assigned and this was the first question discussed in petitioners' briefs in that court. Petition for rehearing was filed, and under Section IV, petitioners claimed Federal right was again asserted. (R. 238 .....). The petition for rehearing was denied. (R. 240).

Petitioners filed motion for stay of issuance of mandate in the court below, setting forth that by virtue of the various motions, and exceptions made both in the trial court and in the Supreme Court of Arkansas, the validity of Section 8333 and 8334 of Pope's Digest of the Statutes of Arkansas had been drawn in question, and had been so construed by both courts in such manner as to deny to petitioners their rights under the due process and equal protection clauses of the Fourteenth Amendment. It was made known to the court below that the stay of issuance of mandate was desired so that

time could be afforded petitioners to prepare an appeal to the Supreme Court of the United States. R. 240 .....). Chief Justice Griffin Smith signed an order granting the stay until and including the 19th day of September, 1940, on the condition that said appeal be perfected within the time prescribed by law.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. By final judgment, the validity of Sections 8333 and 8334 of Pope's Digest of the Statutes of the State of Arkansas have been drawn into question in this cause on the ground of same being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, the decision of the highest court of Arkansas being to the effect that the construction placed thereon when applied to petitioners in said cause was valid, the judgment of the Supreme Court of Arkansas being final.

2. The action of the trial court, in declining to sustain petitioners' motion to quash the jury panel, and the affirmance thereof by the Supreme Court of Arkansas amounted to a deprivation of fundamental and established rights of petitioners, which amounted to denial of Federal right, so far as procedural due process is concerned.

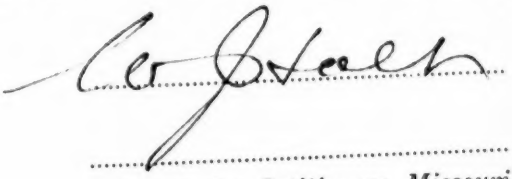
3. In respect of petitioners' claimed Constitutional rights, they have been consistent in such claims throug[illegible]

out, first in the trial court, by motion to quash and by motion for rehearing in that court, and finally by the assignments of error in the Supreme Court of Arkansas, and the petition for rehearing after the cause went against them in that court, and by that court's failure to give due recognition thereto, petitioners are entitled to invoke the judgment of this Court.

4. Petitioners having definitely raised a Federal question in the trial court and in the Supreme Court of Arkansas, they were entitled to a decision by that court, and not having received that consideration, petitioners are entitled to invoke the judgment of the Supreme Court of the United States, even though the existence of the right for which the Constitutional protection is claimed depends upon an act of the Legislature of the State of Arkansas.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Arkansas, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in causes numbered and entitled on its docket; Nos. 4—5917, 4—5946, Missouri Pacific Transportation Company et al. vs. Parker et al.; and that the judgment of the Supreme Court of Arkansas be reversed, and that your petitioners may have such other and fur-

ther relief in the premises as this Honorable Court may deem proper.



*Attorney for Petitioners, Missouri Pacific Transportation Company, Charles D. Johnson, Commercial Casualty Insurance Company, and Metropolitan Casualty Company.*

In the

# SUPREME COURT OF UNITED STATES

October term, 1940

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MISSOURI PACIFIC TRANSPORTATION COMPANY,
CHARLES D. JOHNSON,
COMMERCIAL CASUALTY INSURANCE COMPANY,
METROPOLITAN CASUALTY COMPANY, *Petitioners*

vs.

EUGENE A. PARKER, ADM., MYRTLE FLAGG, ADMX.,
ALICE CARROLL, ADMX., and ROY PALMER;
*Respondents and Appellees Below*

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## BRIEF IN SUPPORT OF WRIT OF CERTIORARI

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### I.

### OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Arkansas is reported in 140 S. W. (2d) 997. (See also Appendix, p. 14.)

## II.

## JURISDICTION

The opinion of the Supreme Court of Arkansas is dated May 13, 1940. (R. 232). Petition for rehearing was seasonably filed May 30, 1940 (R. 238), and was denied on June 17, 1940 (R. 240). Upon motion, stay of mandate was granted, to expire the 19th day of September, 1940, provided the appeal to this Honorable Court be perfected within the time prescribed by law.

2. The jurisdiction of this court is invoked under the provisions of Section 237 (b) and 240 (a) of the Judicial Code, as amended by act of February 13, 1925, as interpreted in rule 38, sub-section 1 of this court.

Petitioners have been consistent in their claim that their Federal rights were invaded both by the trial court and the Supreme Court of the State of Arkansas, and by the latter court's failure to decide the Federal question presented to it, petitioners are now entitled to invoke the judgment of this court to have same decided.

## III.

## STATEMENT OF THE CASE

A full statement of the case has been given under the heading, "Statement of the Case," in the petition which is hereby adopted and made a part of this brief.

## IV.

## SPECIFICATIONS OF ERROR

Petitioners respectfully refer to "reasons relied on for allowance of writ," and adopt each of said grounds as specifications of error which should require a reversal of the judgment of the Supreme Court of Arkansas.

## V.

## ARGUMENT

Petitioners respectfully urge that the trial court's failure to quash the jury panel under the circumstances set forth on Pages 3-4 of the petition, and the affirmance of the construction placed upon the statutes of Arkansas regulating such matter by its Supreme Court definitely amounted to a deprivation of fundamental and established rights of petitioners, which amounted to a denial to them of rights guaranteed to them by the due process and equal protection clauses.

It is one of the essentials of due process of law that a fair hearing be afforded a litigant in a trial which may result in the assessment of heavy damages against it. The very statement of petitioners' complaint by the Supreme Court of Arkansas demonstrates that petitioners were not dealt with by the trial court the same as other litigants.

Petitioners were consistent throughout in praying for a decision on a claimed Federal right. This matter was

presented to the Supreme Court and was ignored. They were entitled to a decision on the Constitutional issue, and if the Supreme Court of Arkansas has evaded that issue, this court should take jurisdiction and decide it. The Federal question was definitely raised and the Supreme Court of Arkansas failed to give it due recognition, and not having done so, petitioners are entitled to invoke the judgment of the court. (See Fox River Paper Company vs. Railroad Commission, 274 U. S. 650-657; 71 L. Ed. 1279, and cases cited.)

If the judgment of the Supreme Court of Arkansas is allowed to stand, petitioners will be prejudiced to the extent of $27,000.00, and in these circumstances they believe that procedural due process has been denied them in violation of the Fourteenth Amendment, and that this court should bring the case here and reverse the judgment of the Supreme Court of Arkansas.

We urge that the required remittitur of $11,000 in each of the three $16,000 judgments is a judicial finding on the part of the Supreme Court of Arkansas that the judgments were excessive. Certainly this action of the Supreme Court was a judicial pronouncement that the jury's findings were the result of rank, unreasonable prejudice in fixing damages at a sum in excess of three times the value of the claim.

We further urge that the circumstances attending the court's action in quashing the jury panel and their subsequent resummoning was prejudicial to applicant's cause. The court quashed the jury panel. Without ex-

cusing the panel and in their presence, he directed the sheriff to summon bystanders. The sheriff, without leaving the court room, summoned as bystanders the entire panel that had been quashed. Applicant was consequently forced to move to quash the panel in the presence of the panel that had just witnessed the quashing and resummoning of themselves. The verdict reflect that the jury was prejudiced by the entire proceedings and expressed their misunderstanding of the entire affair with excessive verdicts which were so unconscionable that the Supreme Court required a remittitur of more than two-thirds of their finding.

WHEREFORE, petitioners pray that this petition for a writ of certiorari be granted, and that this court proceed as is required by the law and the rules of this court in such cases, and that upon final hearing, the said judgment of the Supreme Court of Arkansas and of the District Court be reversed and that this court remand the cause to the proper state court, with proper instructions.

MISSOURI PACIFIC TRANSPORTATION COMPANY;
CHARLES D. JOHNSON;
COMMERCIAL CASUALTY INSURANCE COMPANY;
METROPOLITAN CASUALTY COMPANY

By .....

*Attorney*

## APPENDIX "A"

MISSOURI PAC. TRANSP. CO. ET AL.

v.

PARKER, ET AL.

Nos. 4—5917, 4—5946

Supreme Court of Arkansas,

May 13, 1940.

McHANEY, Justice.

On the night of December 2, 1938, about 10:30 o'clock, three boys, James Carroll, Gordon Flagg and Joe Parker, residents of Morrilton, Arkansas, while returning from Plumerville to Morrilton, where they had attended a basket ball game, had a collision with a large passenger bus belonging to appellant Missouri Pacific Transportation Company, and driven by the other appellant, Chas. D. Johnson, and all three boys were killed. Young Carroll was driving the car in which they were riding, he and Flagg each being in their sixteenth year and Parker was past seventeen. The mothers of the Carroll and Flagg boys and the father of the Parker boy were duly appointed the personal representatives of their respective son's estates and brought separate actions against appellants to recover damages for the benefit of said estate for conscious pain and suffering and for the benefit of themselves for the pecuniary loss sustained by each. Roy Palmer, a passenger on the bus, also brought an action against appellants to recover damages for personal injuries sustained by him. Although this accident occurred in Conway county, just a short

distance south or east of Morrilton, where all the parties plaintiff and all the witnesses resided, these actions were brought at Prescott in Nevada county, some one hundred miles or more away.

The bus was traveling in an easterly direction toward Little Rock, and the car in which the boys were riding was going in the opposite direction and traveling on its right side of the highway. The negligence charged against appellants is that the driver of the bus, Johnson, attempted to pass another car traveling in the same direction and pulled over to his left side of the road, in the path of the car in which the boys were riding. Johnson, in an effort to exonerate himself, testified that the car in front of him suddenly stopped, at a time when he was too close to it to stop his bus, and that to avoid striking it, he pulled to the left across the highway and into a ditch and that the car the boys were in had plenty of room to pass had it remained on the highway, but that its driver pulled to the right and struck the bus off the highway. We think a case of liability was made for the jury, even though his testimony had been accepted by the jury as true, for had he been driving at a reasonable rate of speed and at a safe distance from the car he says stopped in front of him, it would not have been necessary to drive the bus in the path of the oncoming car. The fact that it was a dark and rainy night with slippery road conditions made it all the more necessary for care and caution.

But appellants concede that a question of liability was made for the jury. Trials resulted in verdicts and judgments as follows: For the Carroll boy $16,000 to the mother and $2,000 for the estate on account of conscious pain and sufferings; for

the Flagg boy $16,000 for the mother; and for the Parker boy $16,000 for the father. There was also a verdict and judgment for $10,000 for appellee Palmer, making a total of $60,000 in the four cases which were consolidated for purposes of trial, and have been briefed together on appeal.

A number of errors of the trial court are assigned and argued for a reversal of these judgments, some of which will be hereinafter discussed. One of them relates to the empaneling of the jury. In June 1939, the court appointed three jury commissioners to select the regular panel of petit jurors to serve at the July term of the Nevada circuit court, and a jury was selected. After the July term of court was convened and the jury so selected was empaneled, a motion was made in another case then pending to quash the panel because one of the jury commissioners had served as such within four years prior to this service. The motion was sustained and the panel was quashed, and at the same time the court appointed three other jury commissioners to select a jury to serve at an adjourned term of court to convene on August 7, 1939. A jury of 32 was selected and summoned, but the court, on investigation, decided that the statutes do not provide for the selection of a jury by jury commissioners after the term begins, but that, in case the jury panel is quashed, it is the duty of the court to order the sheriff to select a jury from the bystanders. So, the court, on its own motion, quashed the panel selected by the second set of jury commissioners and directed the sheriff to select a jury from the bystanders. The panel selected by the second set of commissioners contained nine of the jurors selected by the first set, which was quashed on motion. Acting on the order of the court, the sheriff

selected a jury panel of 32 jurors who were the same as those quashed on the court's own motion. Appellants moved to quash the panel selected by the sheriff setting out the matters above stated, which motion was overruled.

We think no reversible error was committed in this regard. The mere fact, if it be a fact, that the first and second panels selected by the two sets of jury commissioners were illegally selected, did not disqualify them as jurors, if later properly selected. Section 8833 of Pope's Digest provides: "If, for any cause, the jury commissioners shall not be appointed, or shall fail to select a grand or petit jury, as provided in this chapter, or the panel selected shall be set aside, or the jury lists returned in court shall be lost or destroyed, the court shall order the sheriff to summon a grand or petit jury of the proper number who shall attend and perform the duties thereof, respectively, as if they had been regularly selected."

While that section does not direct the court to order the sheriff to summon "bystanders", the fact is that the sheriff selected a jury from all parts of the county, they being present in court in obedience to a summons, having been selected by illegal jury commissioners, as the court thought. It is not suggested by appellants that any one of the jurors so selected was otherwise disqualified. Compare Hulen v. State, 196 Ark. 22, 115 S. W. 2d 860.

Other assignments of error argued relate to the giving and refusal to give certain instructions. Instructions 1, 2, 3 and 4 were instructions given in the language of Act No. 300, page 1103, of the acts of 1937, regulating the driving of vehicles on the highways of this state. Each instruc-

tion was a separate section of said act. We think no error was committed in this regard, as they were simple declarations of the law of the road which no persons of reasonable intelligence could misunderstand. As said by this court in St. Louis, I. M. & S. Ry. Co. v. Elrod, 116 Ark. 514, 173 S. W. 836, 837, where the reading to the jury of the lookout statute was held not to be error, "the better practice is for the court to interpret any statute, about the interpretation of which there is or may be a difference of opinion." A number of our cases hold that it is error to read to the jury as an instruction a statute which requires interpretation. Such a case is Kansas City Ft. S. & M. Ry. Co. v. Becker, 63 Ark. 477, 39 S. W. 358, where the fellow servant statute was read. Another is Arkansas Shortleaf Lumber Co. v. Wilkinson, 149 Ark. 270, 232 S. W. 8, where the fellow servant rule as to all corporations, except while engaged in interstate commerce, was involved. Instructions 3, 4 and 5, requested by appellants and refused, were interrogatories to be propounded to the jury, calling for special findings of fact. Under section 1528, Pope's Digest, the jury may be required by the court to make special findings, but we have always held that this matter rests in the sound discretion of the trial court which this court will not disturb, unless there has been a clear abuse of it. Johnson v. Missouri Pac. R. Co., 149 Ark. 418, 233 S. W. 699. No abuse of discretion is here shown. Another instruction given at the request of appellees, Carroll, Flagg and Parker, which it is said is erroneous relates to the measure of damages for the mothers and father. In view of the disposition we make of another assignment on the excessiveness of the verdicts and judgments in their favor, we think it unnecessary to set out said instruction or comment on it further.

On a supplemental motion for a new trial, the question of the qualification of Grady Harris, one of the jurors who tried these cases, was raised for the first time,—it being asserted that he was a resident of Hempstead county and not of Nevada county. The facts are that Harris was born and reared in Nevada county and had always paid his personal property and poll taxes in said county and voted therein and nowhere else. A few years ago, he bought a farm on the line between Nevada and Hempstead counties, a part being in each county. He moved in a tenant house just over the line in Hempstead county where he has since resided. He intended when he bought the farm, and still does, to build a new home on a site in Nevada county, but hard times have prevented him from so doing. We think under these facts that Harris has not changed his domicile from Nevada to Hempstead, see 17 Am. Jur. p. 599, sec. 16, and that he was a qualified juror, at least after the service had been rendered and the verdict returned.

The question that has given us most concern is the amount of the verdicts and judgments for these parents for the pecuniary loss sustained by them for the wrongful death of their minor sons. We think these verdicts of $16,000 each are grossly excessive under all the former decisions of this court. As to the verdict and judgment for $2,000 in favor of Mrs. Carroll as administratrix for the benefit of this estate, for conscious pain and suffering of the deceased, it is conceded by appellants that there is substantial evidence to support it, although consciousness at any time after injury is strongly in dispute. And we do not understand that appellants seriously contend that the judgment in favor of Roy Palmer for the injuries sustained by

him is excessive. These two judgments will, therefore, be affirmed.

The recovery of damages for the pecuniary loss sustained by a parent for the wrongful death of a minor child and the amount of such recovery have been the subjects of numerous decisions of this court. We think it would be a work of supererogation to review and attempt to apply or distinguish principles to or from the case at bar. Those interested in the subject may find them reviewed and applied in Morel v. Lee, 182 Ark. 985, 33 S. W. 2d 1110, where a verdict was reduced to $2,500 for the death of a four year old child; in Chapman v. Henderson, 188 Ark. 714, 67 S. W. 2d 570, where a verdict for $7,500 was sustained for death of a 20 year old son who earned $5.50 per day and was the sole support of his mother; in Davis v. Gillin, 188 Ark. 523, 66 S. W. 2d 1057, where a verdict for $12,500 was reduced to $2,500 for the death of a six year old child; in Arkansas P. & L. Co. v. Hoover, 182 Ark. 1065, 34 S. W. 2d 464, where a verdict for $10,000 was reduced to $5,000 for the death of an adult son; in Arkansas P. & L. Co. v. Adcock, 184 Ark. 614, 43 S. W. 2d 753, where a verdict for $2,500 was reduced to $2,000 for the death of a 17 year old son; in Mooney v. Tillery, 185 Ark. 457, 47 S. W. 2d 1087, where a verdict for $1,500 for a 22 year old son was sustained; and many other similar cases cited in the cases mentioned. The amount of the recovery is necessarily speculative. No one can know or testify what the value of the services of a minor child, less its necessary expense, will be. Generally, where the minor is of a tender age, the speculation must be limited to its minority. No legal obligation rests on a child to support a parent after majority except as provided in sec. 7603,

Pope's Digest. The proof shows these decedents to have been bright, industrious boys, all in high school and all hoped to go to college after high school. Necessarily they could not have been of great pecuniary benefit during minority, but they had reached an age and had expressed the hope and purpose, from which the jury was justified in inferring an intention, to be of financial assistance to their parents, after majority. For this reason, we think the maximum verdict any jury would be justified in rendering would be $5,000 each for the benefit of the parent appellees in these cases. If, within 15 judicial days, they will enter remitting of $11,000 each, the judgments will be affirmed. Otherwise, as to these appellees, they will be reversed and remanded for a new trial. Costs of the appeal will be adjudged against appellant and the parent appellees one half each.

HUMPHREYS and MEHAFFY, JJ., dissent from remittiturs ordered.

## APPENDIX "B"

STATE OF ARKANSAS

IN THE SUPREME COURT

November Term, 1939—

May 13, 1940

This cause came on to be heard upon the transcript of the record of the circuit court of Nevada County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in so much of the proceedings and judgments of said circuit court in this cause as awarded judgment for $2,000 to Mrs. Alice Carroll, Admx., for the benefit of the estate of James Carroll, and judgment in favor of Roy Palmer for $10,000.00.

It is therefore considered by the court that the judgments aforesaid be and the same are hereby in all things affirmed, and that Mrs. Alice Carroll, Administratrix of the estate of James Carroll, recover of said appellants and COMMERCIAL CASUALTY INSURANCE COMPANY, NEWARK, N, J., surety in the supersedeas bond filed in this cause, the sum of TWO THOUSAND DOLLARS ($2,000.00) for the benefit of the estate of James Carroll; and that ROY PALMER recover of said appellants and said surety the sum of TEN THOUSAND DOLLARS, ($10,000.00); each of said sums to bear interest at the rate of 6% per annum from the 11th day of March, A. D. 1939.

It is further considered that said appellees recover of said appellants and said surety all their costs in this court and the court below in this cause expended and have execution thereof.

But it is further the opinion of the court that the judgment for $16,000 each in favor of the appellees, Eugene A. Parker, Admr., Mrs. Myrtle Flagg, Admx., and Mrs. Alice Carroll, Admx., are excessive and should be reduced to the sum of $5,000 each, and that if the said appellees will each enter a remittitur of $11,000 from the amount of judgments rendered for the benefit of the respective parents, a judgment for $5,000 in favor of each will be entered.

And now on this day come the appellees by their attorneys and enter their remittiturs, and ask that judgments be entered in accordance with the opinion of the court.

It is therefore considered by the court that EUGENE A. PARKER, ADMR. OF THE ESTATE OF JOE PARKER, recover of said appellants and the COMMERCIAL CASUALTY INSURANCE COMPANY, NEWARK, N. J., the sum of FIVE THOUSAND DOLLARS: that ALICE CARROLL, ADMX. ESTATE OF JAMES CARROLL, recover of said appellants and said surety, the sum of FIVE THOUSAND DOLLARS, ($5,000.00); and that MYRTLE FLAGG, ADMX. ESTATE OF GORDON ERWIN FLAGG, recover of said appellants and said surety the sum of FIVE THOUSAND DOLLARS ($5,000.00); each of said sums to bear interest at the rate of six per cent per annum from the 11th day of August, A. D. 1939.

It is further considered that the costs of the appeal be divided equally between the appellants and parent appellees.

HUMPHREYS AND MAHAFFY, JJ., dissent from the remittiturs ordered.

FILED
OCT 10 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

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MISSOURI PACIFIC TRANSPORTATION CO., ET AL., *Petitioners,*

v. No. 434

EUGENE A. PALMER, ET AL., *Respondents.*

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## RESPONSE OF RESPONDENT, ROY PALMER TO PETITION FOR CERTIORARI

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FRED A. INGHAM,
W. F. DAUGHAN,
*Attorneys for Respondent, Roy Palmer.*

JNO. S. GATEWOOD,
*Of Counsel on the Brief.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

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MISSOURI PACIFIC TRANSPORTATION CO., ET AL.....*Petitioners*,

v. No. 434

EUGENE A. PARKER, ET AL.....*Respondents*.

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## RESPONSE OF RESPONDENT, ROY PALMER TO PETITION FOR CERTIORARI

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### STATEMENT

May it Please the Court:

To affect a Federal question for the purpose of seeking review by this court of the decision of the Arkansas Supreme Court wherein the petitioners herein were appellants and the respondents were appellees (*Missouri Pacific Transportation Company* v. *Parker, et al.*, 73 Ark. Law Reporter, 242) the petitioners assail the action of the trial court in quashing the jury venire, summonsed by a jury commission without legal authority, and the ordering a new jury to be summonsed by the sheriff of the county, upon the alleged ground that the petitioners, defendants below, were thereby deprived of the guarantee of due process under the Fourteenth Amendment to the Fed-

eral Constitution, and also denied equal protection of the law.

This case was originally tried in Nevada County in the circuit court of that county. There are two terms per year of the Nevada Circuit Court, one of which begins the first Monday in January and the second on the first day of July of each year (Pope's Digest 2832). Under the provisions of the Arkansas code at each term of the circuit court the judge of such court is directed to appoint three jury commissioners whose duty it shall be to summons grand and petit jurors for the *next succeeding* term of the court. (2 Pope's Digest, Sec. 8306.) During the January term of the Nevada Circuit Court the judge thereof, in compliance with the mandate of the law, appointed jury commissioners to summons both grand and petit jurors to serve during the July term of said court. The jurors for this term were thus summonsed and reported for service. When a case on the docket was called for trial, a motion was filed by the defendant in that case to quash the venire on the grounds that one of the jury commissioners was disqualified. It being made to appear to the court's satisfaction that one of the jury commissioners selected by him was in fact disqualified to serve, the motion to quash the venire was sustained and the jury excused. Thereupon the court appointed three other jury commissioners to summons jurors to serve at an adjourned day of the same term of court, which was set for August 7th. After court had convened on its adjourned day, the court, having satisfied himself that he had no authority under the statute to appoint jury commissioners to select jurors to serve at the same term at which the commissioners were appointed, vol-

untarily and upon his own initiative, quashed the venire, and ordered the sheriff to summon jurors to serve for the remainder of the term. (2 Pope's Digest, Sec. 8333.) Thirty-two jurors had been summonsed by the jury commissioners last selected by the court, and when the sheriff acting on the direction of the court summonsed a jury to try the case at bar, a motion was filed by petitioners herein, defendants below, asking the court to quash the panel because nine of the jurors summonsed by the jury commissioners were selected by the sheriff to serve on the panel trying the case (R. 12-14-75). When objections were made to the panel selected by the sheriff, the trial court invited one of the defendant's counsels, who was a life-long resident of the county and had practiced law therein for many years and had served as prosecuting attorney of the district, to repair to his chambers and state to him, the court, what juror or jurors he objected to, promising that if any juror was found to be unfit for jury services in any particular, he would of his own accord discharge him (R. 78). This broad and liberal proposition was not accepted by counsel for defendant. All jurors were examined touching their qualification, and each and all responded that they knew nothing about the facts in the case, had never heard of it and were unbiased and unprejudiced and would accord equal consideration to all parties to the suit (R. 79-85).

Petitioners are seeking a review of this case upon *certiorari* upon the grounds that (1) in dismissing the jurors selected a jury commission appointed without authority and impaneling a jury summons by the sheriff as directed by the court, they were denied the guaranty under the Fourteenth Amendment, and deprived of property without

due process of law, and (2) Section 8333, Pope's Digest of the statutes of Arkansas, is unconstitutional for the reason that it authorizes the selection of a jury by the sheriff under direction of the court where the panel of the jury selected by the jury commissioners has for any reason been set aside, ostensibly contending thereby, that a trial by a jury not selected by jury commissioners results in the deprivation of one of property without due process.

## REASONS FOR DENIAL OF CERTIORARI

We respectfully represent and contend that Petitioners' petition for *certiorari* is without merit and should be denied, because: 1. *Petitioners were not denied due process of law either in the trial court or in the Supreme Court of Arkansas, but were accorded all the rights, privileges and processes prescribed by the statute laws of the state.* (Fourteenth Amendment to United States Constitution.)

2. *The petitioners ostensibly by their complaint and petition draw in question the power of a state to prescribe the modes and methods of selecting juries for the trial of cases in its courts as well as their qualifications.*

3. *Petitioners raise the question of the constitutionality of Section 8333, Pope's Digest of the laws of Arkansas, for the first time in this court.* It cannot therefore be considered.

4. *Petitioners were not denied "the equal protection of the law."* (Amendment No. 14, U. S. Constitution.)

### 1.

The record discloses that Petitioner's case was tried in the lower court before a jury of twelve qualified venire-

men selected in the manner prescribed by the laws of Arkansas for the selection of jurors where "the panel selected (by jury commissioners) shall have been set aside." (2 Pope's Dig., Sec. 8333.) There is no question raised as to notice, jurisdiction of persons or of the subject-matter. The main complaint and the ground upon which Petitioner seeks *certiorari* is the manner in which the jury was selected, basing thereon their charge of denial of due process as guaranteed by the 14th Amendment to the Federal Constitution.

The question of procedure in the state courts is peculiarly a subject of State control. The due process clause of the Fourteenth Amendment to the Federal Constitution does not control mere forms of procedure in state courts or regulate the practice therein. It does not even imply that all trials must be by jury nor guarantee any particular form or method of impaneling a jury or the qualifications of jurors. *Brown* v. *Mississippi*, 297 U. S. 278; 80 L. Ed. 682; *Hardware Dealers Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 76 L. Ed. 214; *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904; *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674.

In *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904, 50 S. Ct. 299, this court said:

> "The due process clause (of the Fourteenth Amendment to the Federal Constitution) does not guarantee to the citizens of a state any particular form of procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense."

The record here filed discloses that every provision of the code of the State of Arkansas relating to the selection and impaneling of jurors was complied with. Section 8306 of 2 Pope's Digest provides that the circuit courts at their several terms shall select three jury commissioners and defines their qualifications. Section 8314 of 2 Pope's Digest provides that the jury commissioners thus appointed shall select petit jurors to serve *at the next term of court*. Section 8333 of 2 Pope's Digest provides:

> "If for any cause, the jury commissioners shall not be appointed or shall fail to select a grand or petit jury as provided in this chapter, *or the panel selected* shall be set aside * * * *the court shall order the sheriff to summons a grand or petit* jury of the proper number who shall attend and perform the duties thereof respectively, *as if they had been regularly selected.*" (Italics supplied.)

The venire summons by the jury commissioners to serve at the July term of the Nevada Circuit Court was quashed when it was made to appear on motion in another case, that one of the commissioners was not qualified. Overlooking the fact that the laws of the state did not authorize the appointment of a jury commission to summons jurors to serve at the same term, the court appointed another jury commission to select jurors to serve at its adjourned day, which had been designated as August 7th. After having advised himself that he had no legal authority to appoint such a commission, the court dismissed the jurors who had been thus served. The jurors had never been in the jury box nor been sworn, but at once became bystanders upon their discharge. In selecting the jurors to serve in trying the instant case, the sheriff summonsed nine of those who had been summonsed from all parts of

the court by the unauthorized jury commission (R. 13). There was no showing that any juror thus summonsed was a disqualified juror. The Petitioners therefore had every advantage and use of a trial according to the existing laws of the state, just as all other litigants had enjoyed all over the entire state.

This court said, in *Louisville & N. Ry. Co.* v. *Schmidt,* 177 U. S. 230, 44 L. Ed. 747; 20 S. Ct. 620, quoted and approved by the court in a later case, *Holmes* v. *Conway,* 241 U. S. 624, 36 S. Ct. 681, 683:

> "It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and an adequate opportunity has been afforded him to defend."

This court has also said that when a regular course of justice by an efficacious remedy is secured by the state law, the constitutional requirement contained in the Fourteenth Amendment is satisfied. *New York, N. H. & H. R. Ry. Co.* v. *New York,* 165 U. S. 628, 41 L. Ed. 853. Also, that the requirements of the Fourteenth Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state and the laws operate on all alike and do not subject the individual to the arbitrary exercise of the powers of government, *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 71 L. Ed. 685, 37 S. Ct. 260; *Minder* v. *Georgia,* 183 U. S. 559, 46 L. Ed. 328, 22 S. Ct. 224, 225.

We have discussed reasons One (1) and Two (2), assigned for rejection of the petition for *certiorari* together immediately above for the reason that they are sufficiently near identical as to make applicable to both the argument made in support of either.

## II

The question as to the constitutionality of Section 8333 of Pope's Digest was not raised in the trial court nor in the Supreme Court of Arkansas. It is raised for the first time in the petition for *certiorari*. This court therefore is without jurisdiction. *Wick* v. *Chelan Electric Co.*, 280 U. S. 108, 50 S. Ct. 41, 42; *Young* v. *Masci*, 289 U. S. 253, 53 S. Ct. 599, 602, 77 L. Rep. 1158; *Duignan* v. *United States*, 274 U. S. 253, 71 L. Ed. 996, 47 S. Ct. 566, 568; *Magruder* v. *Drury*, 235 U. S. 106, 113, 35 S. Ct. 77, 59 L. Ed. 151; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 98, 34 S. Ct. 229, 58 L. Ed. 521; *Grant Bros.* v. *United States*, 232 U. S. 647, 660, 34 S. Ct. 452, 58 L. Ed. 776.

In the *Duignan* case, *supra*, (*Duignan* v. *United States*, 274 U. S. 253) this court said:

> "We do not consider the constitutionality of the forfeiture under Sec. 23. The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of this court, and so far as the record discloses, it was not presented there. This court sits as a court of review. It is only in exceptional cases coming here from federal courts that questions not pressed or passed on below are reviewed."

In petitioner's motion to quash the jury panel (R. 12-14) the constitutionality of Sec. 8333 of Pope's Digest was not mentioned nor in any form assailed. In their motion for a new trial in the trial court (R. 62-70) in the Palmer case no reference was made to the section of the state statute now under fire. In their brief in the Supreme Court of Arkansas on appeal they did not attack the constitutionality of said section of the code, hence the court of last resort did not have such a question before it to pass upon.

Moreover, the manner in which jurors shall be selected, and impaneled and the right to prescribe their qualifications is wholly and exclusively within the power of the respective state legislatures. See cases cited Subject One (1) *supra.*

## III

*Equal Protection of the Law.* Petitioners urge that they were denied equal protection of the law when the panel of the jury selected by an unauthorized jury commission was quashed, and in pursuance to local statute, the sheriff was ordered by the court to summons other jurors, and in doing so summonsed nine of the original panel that had been selected by the jury commission. It is well settled that equal protection of the law as guaranteed by the 14th Amendment to the Federal Constitution is extended by the states to persons when its courts are open to them on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their person and property, the prevention and redress of wrong. *Traux* v. *Corrigan,* 257 U. S. 312, 332, 333, 42 S. Ct. 124, 129, 66 L. Ed. 254; *So. Ry. Co.* v. *Green,*

216 U. S. 400, 30 S. Ct. 287, 289, 54 L. Ed. 536; *South Carolina* v. *McMaster*, 237 U. S. 63, 35 S. Ct. 504-506.

Petitioners fail to show in what respect they imagine they have been denied equal protection of the law. The means and methods followed in the impaneling of a jury to which this case was first tried was the same methods applied in like cases by all other courts of the state and the jury was impaneled according to the direction and authority of the State statute. The selection of nine of the jurors that had first been summonsed by the jury commissioners did not constitute a denial of the due process clause of the 14th Amendment to the Federal Constitution nor of equal protection. These jurors had been selected from all parts of the county by the commissioners. They had never been sworn as jurors and were as eligible as they would have been had they served as jurors selected by the jury commissioners. When examined on their *voir dire* each one was shown to be without bias or prejudice and to have no knowledge of the facts in the case to be tried (R. 79, 85) and to be otherwise lawful and qualified jurors.

## IV

It is argued, as a ground for granting *certiorari*, that "the affirmance of the construction placed upon the statute of Arkansas regulating such matters (selecting a jury) by its Supreme Court definitely amounted to a deprivation of fundamental and established rights guaranteed to them by the due process and equal protection clauses."

(Petitioners' Brief, p. 11.)

This contention has been rejected by this Court in many cases wherein it had been urged. Among these cases

is *Neblett* v. *Carpenter,* 305 U. S. 297, 302, 59 S. Ct. 170-173, where, in holding that a decision of the Supreme Court of the State of California which construed a state statute that delegated broad powers to the Insurance Commissioner and upheld same as constitutional, was not a denial of the due process clause of the 14th Amendment, this court said:

> "All these holdings concern matters of state law and amount at most to alleged erroneous construction of the state statutes by its own Court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. U.S.C.A. Amend. 14. We are therefore without jurisdiction to review the State court's decision of any of these questions."

See, also, *Howard* v. *Kentucky,* 26 S. Ct. 189, 191, 200, U. S. 164; *American Ry. Express* v. *Kentucky,* 273 U. S. 269, 273, 47 S. Ct. 353, 354; *Enterprise Irrigation Dist.* v. *Farmer's Mutual Canal Co.,* 243 U. S. 157, 165, 166, 37 S. Ct. 318, 321; *Traux* v. *Corrigan,* 257 U. S. 313, 329, 22 S. Ct. 425; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. U. 651, 655, 27 S. Ct. 669, 671.

For the reasons herein assigned and presented with argument we respectfully submit that this court is without jurisdiction of the cause and that Petitioners' petition for *certiorari* should be denied.

Respectfully submitted,

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